SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

STATE OF MISSOURI,)
)
Plaintiff,)
)
vs.) Cause No. 80-1561
)
ROBERT GENE LOWERY,)
)
Defendant.)

AFFIDAVIT AND MOTION FOR LEAVE TO PROCEED IN FORMA PAUPEROUS

Comes now Lawrence O. Willbrand, Attorney for Defendant, Robert Gene Lowery, and upon first being duly sworn on his oath states that to the best of his knowledge and belief defendant has been confined in the penetentiary for over the last year and no doubt has no access to funds to employ an attorney or prosecute any legal matter and,

For the last year the undersigned has been a court appointed attorney as the result of the State decision and judicial determination that said defendant is completely without funds or assets and is for practical purposes a complete pauper.

Therefore, defendant moves for leave to proceed in this court in forma pauperous as he has been proceeding in State Court as aforesaid.

WHEREFORE, defendant prays accordingly and further affiant sayeth not.

Lawrence O. Willbrand
LAWRENCE O. WILLBRAND
Attorney for Defendant
818 Olive Street, Suite 873
St. Louis, Missouri 63101
436-7715

Subscribed and sworn to before me this 13 day of May, 1981.

My term expires:
8/20/84

Nancy E. DeWeese
NOTARY PUBLIC

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STATE OF MISSOURI, Plaintiff,	)	
vs.	)	Cause No. 80-1561
ROBERT GENE LOWERY, Defendant.	)	

DEFENDANT'S OPPOSITION BRIEF

The Supreme Court of Missouri En Banc held in Sours v. State of Missouri, 630 S.W.2d 592, and 593 S.W.2d 208, that the double jeopardy clause of the fifth amendment to the U.S. Constitution prohibits the state from punishing a person twice for the same offense, citing Benton v. Maryland, 395 U.S. 784.

In applying the "same evidence" test the court observed that proof of robbery requires the same proof as armed criminal action both of which this defendant was convicted.

Application of the "same evidence" test is supported by the U.S. Supreme Court in Illinois v. Vitale, _____U.S._____, 100 S. Ct. 2260, 65 L.Ed 2d 228 (1980), in which the latter court prohibits imposing multiple punishment for the same offense.

The armed criminal elements would constitute a lesser included offense.

The legislature of a State may not impose on the judiciary acts which violate judicial concepts of administration of justice pursuant to our Constitutions which are deemed violative of the latter.

It is quite clear that the statute in question was not a mere punishment-enhancement statute designed to amend the armed robbery statute because the Missouri Constitution prohibits an amendment without setting forth in full the statute to be amended hence armed criminal action is intended to be a separate crime.

Obviously the legislature sets out prescribed ranges of punishments for certain offenses and it would be contrary to justice, fair play and our Constitutions, for the courts to

assess duplicious punishments for the same act.

The same act which violates the one statute also violates the other.

One who theoreticaly reads the one statute is led to believe that the crime and punishment is set out but one would be greviously misled unless the doctrine of double jeopardy were not applied.

In the instant case the defendant suffered a sentence of twenty-five years for the armed robbery and another twenty years because he was armed when he committed the armed robbery, to run consecutively.

The issue is important whether we are dealing with form rather than substance. But if the form misleads and results in duplication of punishments, it becomes a substantive matter involving twenty years of human life.

Why is it necessary to provide punishment for the act in two separate legislative enactments. Why not six separate punishment statutes which would allow the prosecuting authority to hold three or four of them as a weapon to threaten the defense?

One of those threats would be the shadow of possibly six trials for the same act which would give the prosecutor six bites at the same apple.

It it can be done twice there is no limit.

Under the Missouri Constitution the instant statute cannot be a punishment-enhancement device and if allowed to stand in the face of double jeopardy, a weapon which threatens our Constitutional form of punishment will be given nurture and life.

WHEREFORE, the application for certiorari must be denied.

Respectfully submitted,

LAWRENCE O. WILLBRAND
Attorney for Defendant
818 Olive Street, Suite 873
St. Louis, Missouri 63101
436-7715